

STATE OF MICHIGAN
COURT OF APPEALS

LAFARGE MIDWEST, INC.,

Plaintiff-Appellant,

v

FRANKENMUTH MUTUAL INSURANCE
COMPANY,

Defendant-Appellee.

UNPUBLISHED

August 11, 2005

No. 253591

Muskegon Circuit Court

LC No. 03-042472-CK

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Lafarge Midwest, Inc., appeals as of right from the trial court order granting defendant Frankenmuth Mutual Insurance Company's motion for summary disposition. We reverse and remand for entry of an order granting summary disposition in favor of Lafarge Midwest. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

The instant case arose when a driver employed by Triple R Trucking, Inc., James Blackwell, slipped when descending a stairway at Lafarge Midwest's plant in Muskegon. After Blackwell brought suit against Lafarge Midwest for his resulting injuries, Lafarge Midwest filed this action for a declaratory judgment against Frankenmuth Mutual, Triple R's insurance company. Lafarge Midwest asserts that because it is listed as an "additional insured" on Triple R's insurance policy, Frankenmuth Mutual must defend Lafarge Midwest in the suit brought by Blackwell and provide coverage for any damages if Lafarge Midwest is found liable.

Frankenmuth Mutual filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that Lafarge Midwest is not entitled to coverage based on the plain language of the policy. Frankenmuth Mutual asserted that Lafarge Midwest only constituted an additional insured with respect to liability arising out of Triple R's "ongoing operations performed for [Lafarge Midwest]," and because Blackwell was not engaged in Triple R's ongoing operations at the time of the accident, Lafarge Midwest was not entitled to coverage. The trial court found nothing in the record to indicate that Blackwell was doing anything other than going to make a pot of coffee when his accident occurred. It therefore held that Lafarge Midwest was not entitled to coverage under the policy and granted Frankenmuth Mutual's motion.

II. Summary Disposition

A. Standards Of Review

The decision to grant or deny summary disposition is a question of law that we review de novo.¹ The proper interpretation of a contract is also a question of law subject to review de novo.²

B. Legal Standards

Under MCR 2.116(C)(10), summary disposition is appropriate when there is no genuine issue as to any material fact. A question of material fact exists “when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”³ Where it “appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.”⁴

C. Construing The Policy

Courts construe the terms of insurance policies in accord with the well-settled principles of contract construction.⁵ In *Michigan Mut Ins Co v Dowell*,⁶ this Court stated: “An ambiguous provision in an insurance contract must be construed against the drafting insurer and in favor of the insured. However, if the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense.”⁷ In the instant case, the insurance policy between Frankenmuth Mutual and Triple R lists Lafarge Midwest as an “additional insured”; however, the contract states that coverage applies “only with respect to liability *arising out of [Triple R’s] ongoing operations performed for that insured.*” [Emphasis added.]

As the trial court noted, this Court interpreted the phrase “arising out of” in *McKusick v Travelers Indem Co*.⁸ In that case, the plaintiffs sought payment from the insurer of a company that manufactured a high-pressure hose delivery system after the system failed and exposed them to a highly toxic substance.⁹ The trial court granted summary disposition based on the pollution

¹ *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

² *Id.*, citing *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

³ *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

⁴ *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999); MCR 2.116(I)(2).

⁵ *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003).

⁶ *Michigan Mut Ins Co v Dowell*, 204 Mich App 81; 514 NW2d 185 (1994).

⁷ *Id.* at 87, citing *Clevenger v Allstate Ins Co*, 443 Mich 646, 654; 505 NW2d 553 (1993).

⁸ *McKusick v Travelers Indem Co*, 246 Mich App 329, 340-341; 632 NW2d 525 (2001).

⁹ *Id.* at 330-332.

exclusion clause in the manufacturer's insurance contract.¹⁰ On appeal, the plaintiffs asserted that the exclusion did not apply because their injuries did not "arise out of" the manufacturer's product in that (1) their injuries occurred during an attempt to clean up the chemical rather than during the initial spill, and (2) that their injuries were caused by the toxic chemical rather than the manufacturer's equipment.¹¹ This Court stated that although the phrase "arising out of" had not been interpreted in the context of an insurance policy like the one at issue, it had been defined in the "areas of worker's compensation and automobile insurance law."¹² It noted:

To establish that an injury arose out of employment, the employee must illustrate that the injury occurred as a circumstance of or incident to the employment relationship. To establish that an injury arose out of an automobile accident, the claimant must illustrate a causal connection that is more than incidental, fortuitous, or remote between the use of the motor vehicle and the injury.^[13]

In applying these principles and affirming the trial court's order, this Court held that both the chemical release and the plaintiffs' injuries had "significantly more than a remote connection" to the manufacturer's defective product.¹⁴

In *DaimlerChrysler Corp v G Tech Professional Staffing, Inc.*,¹⁵ this Court interpreted similar language in an indemnity contract. The defendant, a professional staffing company, provided the plaintiff with an employee who was subsequently involved in an accident while driving a vehicle belonging to the plaintiff.¹⁶ The family of a man killed in the accident brought suit against the plaintiff, who in turn sued to enforce the indemnity clause in its contract with the defendant.¹⁷ In affirming a grant of summary disposition in favor of the plaintiff, this Court stated that the language of the indemnity clause, requiring that the personal injury "arise out of or be related to the performance of any work in connection with the contract," was expansive.¹⁸ Because the undisputed facts showed a "logical association connecting the contract, and [the employee's] work under the contract, to the accident," this Court held that the trial court did not err in finding the indemnity clause applicable.¹⁹

¹⁰ *Id.* at 331-332.

¹¹ *Id.* at 340.

¹² *Id.*

¹³ *Id.* at 340-341 (citations omitted).

¹⁴ *Id.* at 341.

¹⁵ *DaimlerChrysler Corp v G Tech Professional Staffing, Inc.*, 260 Mich App 183, 186-187; 678 NW2d 647 (2003).

¹⁶ *Id.* at 184.

¹⁷ *Id.*

¹⁸ *Id.* at 186.

¹⁹ *Id.* at 187.

In the instant case, we hold that the language of Triple R's insurance contract entitles Lafarge Midwest to coverage as an additional insured. Like the contractual language in *DaimlerChrysler*, the phrase "arising out of [Triple R's] ongoing operations" is expansive. Contrary to the trial court's holding, the undisputed facts show that Blackwell's accident was neither incidental to nor remote from Triple R's ongoing operations for Lafarge Midwest. Blackwell's sole reason for being present at Lafarge Midwest's plant was to pick up a load of cement in his capacity as a driver for Triple R. Although the accident occurred during a delay in loading Blackwell's truck when he went into Lafarge Midwest's office to use the bathroom and make a pot of coffee, a logical association exists between Blackwell's actions and Triple R's ongoing operations. Rather than entering the building merely to satisfy his own needs, Blackwell also went inside the office to inquire as to the cause of the delay. Further, it is logical to assume that drivers will stop to relieve themselves and obtain refreshments as part of the ongoing operations of a trucking company.

As with the relationship between the plaintiffs' injuries and the manufacturer's defective product in *McKusick*, "significantly more than a remote connection" existed between Blackwell's accident and Triple R's ongoing operations for Lafarge Midwest.²⁰ Accordingly, the trial court erred in finding that the accident did not "arise out of" these operations and in denying Lafarge Midwest coverage as an additional insured under Triple R's policy with Frankenmuth Mutual. Consequently, we reverse the trial court's order granting Frankenmuth Mutual's motion for summary disposition and remand the case for entry of an order granting summary disposition in favor of Lafarge Midwest.

Reversed and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

²⁰ See *McKusick*, *supra* at 341.